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In the Supreme Court of the United States

OCTOBER TERM, 1982

THE HELEN MINING COMPANY AND KENTLAND-ELKHORN COAL CORPORATION, PETITIONERS

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Section 103(f) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. (Supp. IV) 813(f), entitles a miners' representative to accompany federal mine inspectors, without suffering loss of pay, on both "spot" inspections and "regular" inspections conducted under the Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-46a) is reported at 671 F. 2d 615. The opinions of the Federal Mine Safety and Health Review Commission (Pet. App. 47a-80a, 81a-84a, 85a-86a) are reported at 1 F.M.S.H.R.C. 1796, 1 F.M.S.H.R.C. 1833, and 1 F.M.S.H.R.C. 1947. The decisions of the administrative law judges (Pet. App. 87a-93a, 107a-121a, 95a-106a) are reported at 1 F.M.S.H.R.C. 219, 1 F.M.S.H.R.C. 1451, and Dec. F.M.S.H.R.C. 89.

JURISDICTION

The judgment of the court of appeals (Pet. App. 123a-125a) was entered on February 23, 1982. A petition for rehearing (Pet. App. 127a) was denied on April 9, 1982. The petition for a writ of certiorari was filed on July 8, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 103(f) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. (Supp. IV) 813(f), provides for "walkaround" rights for representatives of the miners. These rights include "an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of [Section 103(a)]." Section 103(a) states that the Secretary of Labor "shall make frequent inspections" of underground and surface mines each year for certain specified purposes, including (1) to determine whether an imminent danger exists and (2) to determine whether there is compliance with mandatory health and safety standards or any citation or order issued under the Act (30 U.S.C. (Supp. IV) 813(a)).[1] The provision also sets a minimum number of inspections for these two purposes: "the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year." 30 U.S.C. (Supp. IV) 813(a). See *Donovan* v. *Dewey*, 452 U.S. 594, 596 (1981). Examinations of entire mines are commonly referred to as "regular" inspections; all other inspections under the Act are referred to as "spot" inspections (Pet. App. 6a n.4). Spot inspections are conducted for a number of specific purposes, some of which are expressly authorized by statutory provisions in addition to Section 103(a).

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[1]Section 103(a) also authorizes representatives of the Secretaries of Labor and Health and Human Services to make inspections for the purposes of obtaining, utilizing and disseminating information relating to health and safety standards and gathering information with respect to mandatory health and safety standards. The Section 103(f) "walkaround" provision refers, however, only to the Secretary of Labor's inspections. Thus, only the Secretary of Labor's inspections to assess imminent danger and compliance with the Act are at issue in this case.

In a published bulletin, the Secretary has interpreted Section 103(f) as allowing miners' representatives to participate without loss of pay in "spot" inspections as well as "regular" inspections. The bulletin reasons that both types of inspections are conducted to assess imminent danger and compliance with the Act and therefore are made "pursuant to" Section 103(a). See 43 Fed. Reg. 17546, 17547-17549 (1978).

2.a. On Apr. 3, 1978, an inspector for the Department of Labor's Mine Safety and Health Administration (MSHA) conducted a spot inspection to check for methane gas at an underground mine operated by petitioner, Helen Mining Company, as specifically authorized by Section 103(i) of the Act, 30 U.S.C. (Supp. IV) 813(i) (Pet. App. 47a-48a). A miners' representative accompanied the inspector for three of the five hours of the inspection (*id.* at 48a). Petitioner Helen Mining Company refused, however, to compensate the miners' representative for the three hours (*ibid.*). The inspector then issued a citation under Section 104(a) of the Act, 30 U.S.C. (Supp. IV) 814(a), alleging a violation of Section 103(f) (Pet. App. 48a). Petitioner contested the citation and order of the Secretary, and the case was referred to an administrative law judge (ALJ) of the Federal Mine Safety and Health Review Commission (*id.* at 48a-49a). See 30 U.S.C. (Supp. IV) 815(d). The ALJ dismissed the citation and order, holding that Section 103(f) requires operators to compensate a miners' representative only when he accompanies the inspector on a regular inspection (Pet. App. 87a-93a).

b. On May 23 and 24, 1978, a MSHA inspector conducted a "spot" electrical inspection at a coal preparation plant operated by petitioner Kentland-Elkhorn Coal Corporation (Pet. App. 96a). The inspector was accompanied by a miners' representative on both days (*id.* at 98a). When petitioner Kentland-Elkhorn Coal Corporation refused to

compensate the employee for the time spent with the inspector, the Secretary alleged a violation of Section 103(f) (Pet. App. 98a). Petitioner Kentland-Elkhorn applied for review by the Commission and the application was considered, after a hearing, by an administrative law judge. The ALJ held that Section 103(f) requires compensation only for regular inspections (Pet. App. 99a-105a) and vacated the citation issued by the inspector (*id.* at 106a).[2]

c. The Secretary of Labor petitioned the Commission for review of both ALJ decisions in favor of petitioners. Deciding petitioner Helen Mining Company's case first, the Commission, with two commissioners dissenting, rejected the Secretary's position that the Act had been violated (Pet. App. 47a-80a). The Commission found "dispositive" (*id.* at 60a) a statement by Representative Perkins on the floor of the House indicating that Section 103(f) entitled miners' representatives to participate in both regular and spot inspections, but protected them against loss of pay only for regular inspections. See 123 Cong. Rec. 35410 (1977). Relying upon its decision in *Helen Mining*, the Commission affirmed the ALJ's decision in *Kentland-Elkhorn* (Pet. App. 81a-84a) and reversed the ALJ's decision in *Allied Chemical* (*id.* at 85a-86a). See note 2, *supra*.

3. A divided panel of the court of appeals reversed the Commission (Pet. App. 1a-46a). The court of appeals noted that Section 103(f) states that "whenever a miner *is* entitled to participate in an inspection 'pursuant to' subsection (a), he 'shall suffer no loss of pay during the period of his

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[2]A third case that was consolidated with petitioners' cases in the court of appeals, *Allied Chemical Corp.*, involved the same facts as in *Helen Mining*, but the ALJ held that the Act had been violated and issued an order requiring the operator to compensate the miner for the time spent accompanying the federal inspector (Pet. App. 107a-121a). Allied Chemical has not filed a petition for a writ of certiorari.

participating in the inspection * * *' " (Pet. App. 13a, quoting Section 103(f) (emphasis in original)). The court held that this language indicated unambiguously that "the right to walkaround pay is clearly coextensive with the right to accompany the inspector under subsection (f)" and "there is simply no basis for reading it as supporting the bifurcation of participation and compensation rights espoused in the Commission's decisions" (Pet. App. 13a-14a). The court ruled that the Commission erred in according "decisive weight" (*id.* at 17a) to Representative Perkins' statement, because it conflicted with the plain meaning of the statute and was inconsistent with the conference report, which "conveys the quite contrary impression that the broad walkaround pay rights granted by the Senate bill remained unaffected * * *" (*id.* at 15a-16a). See S. Conf. Rep. No. 95-461, 95th Cong., 1st Sess. 45 (1977).

Having rejected the Commission's "bifurcation" of walkaround participation and compensation rights, the court then adopted the Secretary's interpretation that both spot and regular inspections are made "pursuant to" Section 103(a) and thus are given participation and compensation rights under Section 103(f) (Pet. App. 19a-26a). The court reasoned that both regular and spot inspections are conducted to carry out the purposes listed in Section 103(a)—to assess imminent danger and compliance with the Act—and therefore are conducted "pursuant to" that provision (Pet. App. 18a-19a). Moreover, because the legislative history indicated a clear intention by Congress to afford miners broad participation rights, the court thought it unlikely that Congress intended to limit these rights to regular inspections (*id.* at 19a-26a). Accordingly, the court held that miners' representatives had the right to participate in the spot inspections at issue here without loss of pay (*id.* at 18a-26a).

Judge Tamm dissented. Because he viewed the language of Section 103(f) as ambiguous, Judge Tamm concluded that the court should have deferred to Representative Perkins' statement that only participation, not compensation, rights attach to spot inspections (Pet. App. 28a-46a).

ARGUMENT

The decision of the court of appeals is the first judicial interpretation of this aspect of the walkaround pay provisions of the Federal Mine Safety and Health Act of 1977. The court's ruling on a narrow question of statutory construction is reasonable and does not conflict with any decision of this Court or any court of appeals. Therefore, it does not warrant review by this Court.

1. Petitioners' primary contention (Pet. 7-14) is that the court of appeals violated general principles of statutory construction by "ignoring" the clear legislative history, embodied in Representative Perkins' remarks to the House, in construing an "ambiguous" statute. The court of appeals, however, carefully considered the statutory language and *all* of the legislative history of the Act, and merely declined to give "decisive weight" to a single statement in the legislative history that conflicted with the plain meaning of the statute. Section 103(f) of the Act provides that a miners' representative has the right to accompany MSHA personnel during an inspection made "pursuant to" the provisions of Section 103(a) and that "[s]uch representative * * * shall suffer no loss of pay during the period of his participation in the inspection" (30 U.S.C. (Supp. IV) 813(f)). Section 103(f), which is the only provision in the Act that mentions the right to miner participation or the right to walkaround pay, clearly makes the two coextensive.[3] On

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[3]Petitioners assert (Pet. 14-16) that the relationship between the participation and walkaround pay rights ought not to be an issue because the Commission had no reason to discuss participation rights. But this argument, if adopted, would require the Commission and the

this question, the court correctly concluded that the statutory language is "quite unambiguous[]" (Pet. App. 13a).[4]

Based on its holding that Section 103(f) requires participation and walkaround pay to be treated the same, the court concluded that the Commission erred in giving conclusive weight to the statement of Representative Perkins, which described Section 103(f) as allowing participation in spot inspections but not requiring compensation for the time spent on the walkaround. In this regard the court of appeals followed the well-settled principle that statements of legislators and other legislative materials should not be used to "construe a statute contrary to its plain terms" (Pet. App. 13a n.19). See *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Southeastern Community College* v. *Davis*, 442 U.S. 397, 405 (1979). "Such aids are only admissible to solve doubt

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courts to blind themselves to the plain language in the statute that requires the two rights to be accorded the same treatment. It is certainly relevant, in construing one part of a statute, to consider the entire statutory structure. See, *e.g.*, *Fedorenko* v. *United States*, 449 U.S. 490, 512 (1981).

[4]Petitioners contend (Pet. 19) that it would be logical for Congress to compensate miners only for regular inspections, arguing that it is more likely that the effectiveness of a regular inspection would be enhanced by a miner's participation than a spot inspection, which "usually involve[s] narrow, technical procedures." Spot inspections, however, can be quite extensive in scope; this category encompasses any inspection other than one of a mine in its entirety. For example, the inspection at issue in Kentland-Elkhorn was of the entire electrical system of that mine and lasted at least 21 days (Pet. App. 81a). In any event, it is clear that Congress intended that there be a right to participation in spot inspections. Failure to pay a miner during this participation would be contrary to congressional intent since "it is hardly to be expected that a miner, who is not in business for himself, should [participate in health and safety matters] if his activities remain uncompensated." 123 Cong. Rec. 20019-20020 (1977) (remarks of Senator Javits); S. Rep. No. 95-181, 95th Cong., 1st Sess. 28-29 (1977).

and not to create it." *Wisconsin Railroad Commission* v. *Chicago, B. & Q.R.R.*, 257 U.S. 563, 589 (1922).[5]

Alternatively, the court of appeals noted other problems with Representative Perkins' remarks that seriously undercut their reliability as indicia of congressional intent (Pet. App. 15a-17a). For instance, the court pointed out that the statement is not wholly consistent with the Conference Report, which implied that the walkaround pay rights granted by the Senate bill remained unaffected by the changes made by the conference (*id.* at 16a). The Conference Report stated that, on the walkaround question, the conference bill "conforms to the Senate bill," S. Conf. Rep. No. 95-461, 95th Cong., 1st Sess. 45 (1977), and the Senate Report stated that the Senate bill granted miners' representative "full compensation" for assisting inspectors. S. Rep. No. 95-181, 95th Cong., 1st Sess. 28-29 (1977).

In short, petitioners' assertion (Pet. 9) that the court of appeals "did not seek to discredit the remarks of Representative Perkins by reference to other indicia of legislative intent" is plainly incorrect. The court did not ignore Representative Perkins' statement, but carefully considered and rejected it as the exclusive basis for construing Section 103(f). Whether a particular statement of a single legislator is a reliable indicator of Congress' intent obviously is not an

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[5]Petitioners strain to find ambiguity by stressing (Pet. 10-11) that other provisions of the Act use the phrase "any inspection" while Section 103(f) refers to inspections made "pursuant to * * * [Section 103(a)]." This argument does not change the fact, however, that the phrase "pursuant to * * * [Section 103(a)]" applies to both participation and compensation. There is no ambiguity in the coextensive treatment of the two rights. Thus, regardless of the meaning of the phrase "pursuant to * * * subsection (a)," it controls all rights provided in subsection (f). See Pet. App. 13a. Moreover, as Commissioner Lawson explained in his dissent below (*id.* at 76a n.4), the choice of two different phrases in the statute merely reflects the different derivations of the various provisions of the Act.

issue that warrants review by this Court, particularly where, as here, the decision of the court of appeals is reasonable and is based on other evidence in the legislative history. Moreover, the court below is the first to have considered this question. The District of Columbia Circuit is not the only court empowered to review the decisions of the Commission (30 U.S.C. (Supp. IV) 816); by declining to review in this case, the Court could benefit from the views of other courts of appeals regarding what all concede to be a complex statutory scheme (see Pet. App. 18a (opinion of the court), 36a (Tamm, J., dissenting)).

2. Petitioners' other contention (Pet. 14-20) is that the court of appeals failed to give deference to the Commission's decision interpreting Section 103(f), thus creating a conflict with cases under the Occupational Safety and Health Act of 1970, 29 U.S.C. (& Supp. IV) 651 *et seq.*, concerning the relative deference owed to the Secretary and the Occupational Safety and Health Review Commission. This contention is without merit.

First, the court expressly declined to reach the general question of which agency should be accorded greater deference, because "in this instance the Commission's construction is plainly incorrect and unsupportable by the terms of the Act" (Pet. App. 17a-18a n.26). This conclusion follows the well-settled principle that courts need not defer to an agency interpretation where there is a compelling reason not to do so. *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, 94-95 (1973); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). The principle of deference "[i]s constrained by [the courts'] obligation to honor the clear meaning of a statute * * *." *International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 566 n.20 (1979). For the reasons explained above, the court correctly rejected the Commission's interpretation here, adopting instead the

interpretation of the Secretary, which is the only one that "avoids outright conflict with the plain terms of the statute and conforms to the health and safety purposes underlying the Act" (Pet. App. 25a n.43).

Second, decisions interpreting the Occupational Safety and Health Act of 1970 regarding the relative deference to be accorded the Secretary and the Occupational Safety and Health Review Commission are of little use in interpreting the Federal Mine Health and Safety Act of 1977. The Senate Committee that drafted the 1977 Mine Act specifically stated that "[s]ince the Secretary of Labor is charged with responsibility for implementing this Act, it is the intention of the Committee, consistent with generally accepted precedent, that the Secretary's interpretation of the law and regulations shall be given weight by both the Commission and the courts." S. Rep. No. 95-181, *supra*, at 49. Thus, precedent under OSHA on the issue of agency deference does not control the outcome under the Mine Act, which has a very different legislative history. Compare *Brennan* v. *Gilles & Cotting, Inc.*, 504 F. 2d 1255, 1262-1263 (4th Cir. 1974).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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